



Commonwealth of Massachusetts

State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-FD-94-1

FACTS:^{1/}

You represent two county deputy sheriffs who were the subject of an Ethics Commission opinion, *EC-FD-93-1*. In *EC-FD-93-1*, the Commission found that these deputy sheriffs were appointed by a county sheriff to conduct service of process within the county. Under G.L. c. 37, §3, a sheriff must appoint all deputy sheriffs, who serve at the pleasure of the sheriff. A deputy sheriff is unable to serve process without this appointment by the sheriff and without taking an oath of office.^{2/}

In some counties, the process serving function is organized as a separate division in the sheriff's office. The responsibilities of the chief deputy in one such county include: the responsibility for the service and execution of all lawfully issued precepts and other process in that county; responsibility for instituting policies and procedures relative to the service of process in that county; responsibility for the implementation and maintenance of records regarding service of process in that county; responsibility for the day to day management of all deputy sheriffs and administrative staff assigned to the division; and responsibility for the preparation of reports and financial data relative to service of civil process, including the annual financial accounting to the county treasurer, pursuant to G.L. c. 262, §8A. According to the sheriff in that county, the Chief Deputy Sheriff of the Civil Process Division has been designated as a public employee who must file a Statement of Financial Interests ("SFI").

The sheriff of the county in which your clients are deputy sheriffs has stated to us that he expressly authorized the two deputies to perform the civil service of process duties of his sheriff's department. According to the Sheriff, the deputy sheriffs do not report to him on a daily basis, but he retains the power to revoke a deputy sheriff's commission and has oversight and responsibility for service of process by the deputies in his county. See, G.L. c. 37, §2. The Sheriff has stated that the two deputy sheriffs have discretion concerning how to implement these duties, provided that civil process serving is conducted within the confines of the law. However, if problems arise, such as issues concerning the conduct of a deputy sheriff's official duties or whether service of process is being implemented within the confines of the law, or the appointment of new deputy sheriffs, these two deputy sheriffs are accountable to him.

Your clients formed a private corporation ("Corporation"), pursuant to G.L. c. 156B, and serve as President and Treasurer. They manage the civil processing duties for their county through the Corporation. The division of work between the two deputy sheriffs is close to a 50-50 split and they manage the Corporation and share responsibility equally. The Corporation is funded entirely by the fees received from serving process and other duties from which deputy sheriffs may receive a fee. The Corporation's employees do not participate in any county benefits system, such as life insurance, retirement, or deferred compensation. The Corporation does not receive money from the county treasury and does not use county office space.

The Chairman of their County Commissioners, pursuant to G.L. c. 268B, §3(j)(11), designated one of these deputy sheriffs as an individual in a major policy making position who is required to file a SFI with the Commission. In *EC-FD-93-1*, the Commission concluded that these deputy sheriffs were properly designated to file SFIs, as they occupy major policy making positions under G.L. c. 268B, §1(l). The Commission concluded that the deputy sheriffs fit within two of the classifications in the definition of "major policy making position": 1) they earned a salary in excess of that earned by a state employee classified in step one of job group XXV of the general salary schedule contained in G.L. c. 30, §46 and they report directly to the sheriff, as the executive or administrative head; and 2) they are also persons who fall within the definition of "persons exercising similar authority".

You have requested reconsideration of *EC-FD-93-1*, on behalf of these deputy sheriffs, on the issue of whether these deputy sheriffs earn a salary within the meaning of G.L. c. 268B, §1(l). During the previous

opinion process these deputy sheriffs were represented by different counsel. Their prior counsel, when providing the facts for the prior opinion, informed the Commission that each deputy sheriff received a salary. Consequently, the Commission, in *EC-FD-93-1*, was not presented with the salary issue and did not decide the issue as the Commission accepted the facts which were given to it by the prior legal representative.

You state that the deputy sheriffs' prior legal representative was mistaken when he indicated that the deputy sheriffs received a salary. You have presented us with new facts concerning their compensation arrangement, which you would like this Commission to consider. You state that all of the fees for serving process are paid into the Corporation. The Corporation, in turn, remits a portion of the fee to the individual deputy who served the civil process. However, you state that, from 1991 to 1993, neither deputy received a substantial portion of their income from fees received from process which they personally served. As owners of the Corporation, the vast majority of their income is derived from draws against the profits of the Corporation.

At the beginning of the year, both deputies determine a figure for their draws. This decision is the result of informal discussions between the deputies, and is based upon their business judgment, experience, and personal financial situations. In each of the relevant years, this initial figure was lower than the income which they received from the Corporation at the end of the prior calendar year.

Generally, they try to take a weekly draw in an amount that remains stable for a period of months and may also take lump sum payments during the year. However, their total income decreased from 1991 to 1992 and decreased an additional amount from 1992 to 1993. In 1991, the amount of the draws was increased twice. Both deputy sheriffs withdrew substantial lump sum payments twice, as well as smaller distributions. In 1991, one deputy took a check for 40 of the 52 weeks in the year, and the other deputy took a check for 44 of the 52 weeks.

In 1992, the amount of the draw was increased twice, but the increase was less than the preceding year. Both deputies each took one large lump sum payment in January and each received a weekly pay check for 43 of the 52 weeks in the year. In 1993, they increased the amount of their draws once. There were no lump sum payments. One deputy took a draw for 28 of the 52 weeks and the other deputy took a draw for 27 of the 52 weeks. You indicate that, in all three years, the timing of the payments was established and adjusted according to both deputies' business judgment about cash flow and profitability.

QUESTION:

Given the additional facts presented, were these deputy sheriffs properly designated as public employees, within the meaning of G.L. c. 268B, §1(o), who are required to file SFIs?

ANSWER:

The deputy sheriffs do not earn a salary within the meaning of G. L. c. 268B, §1(l). The deputy sheriffs do hold a major policy making position however, as they are "persons exercising similar authority", and thus are required to file SFIs.

DISCUSSION:

G.L. c. 268B requires that a public employee, defined as "any person who holds a major policy making position in a governmental body", file a Statement of Financial Interest. G.L. c. 268B, §5; §1(o). The Legislature has defined "major policy making position" as

the executive or administrative head or heads of a governmental body; all members of the judiciary; any person whose salary equals or exceeds that of a state employee classified in step one of job group XXV of the general salary schedule contained in section forty-six of chapter thirty and who reports directly to said executive or administrative head; the head of each division, bureau, or other major administrative unit within such governmental body; and persons exercising similar authority. G.L. c. 268B, §1(l).

In *EC-FD-93-1*, one of our conclusions was that the deputy sheriffs were public employees as they were "persons whose salary³ equals or exceeds that of a state employee classified in step one of job group XXV of the general salary schedule contained in G.L. c. 30, §46 and who report directly to said executive or administrative

head”. In your request for reconsideration you question whether the income earned by these deputy sheriffs is considered salary within the meaning of G.L. c. 268B, §1(1).⁴ We are mindful that the Legislature, in G.L. c. 4, §7, has defined the word “salary” for use in the General Laws as “annual salary”. We find this definition to be inherently ambiguous as it uses the term to be defined as part of the definition.

Accordingly, we turn to other meanings of the term “salary” and to the legislative history of G.L. c. 268B. See generally, *Commonwealth v. Collett*, 387 Mass. 424, 433 (1982) (“when phraseology of statute is ambiguous, court may look to various steps in its enactment to resolve ambiguity”). When construing statutory language, we begin with the premise that the

intent of the legislature is to be determined primarily from the words of the statute, given their natural import in common and approved usage, and with reference to the conditions existing at the time of enactment. This intent is discerned from the ordinary meaning of the words in a statute considered in the context of the objectives which the law seeks to fulfill. Wherever possible, we give meaning to each word in the legislation; no word in a statute should be considered superfluous.

Int’l. Organization of Masters, etc. v. Woods Hole, Martha’s Vineyard & Nantucket Steamship Authority, 392 Mass. 811, 813 (1984) (citations omitted); *O’Brien v. Director of DES*, 393 Mass. 482, 487-88 (1984).

The common dictionary definition of “salary” from Webster’s Third New International Dictionary is “fixed compensation paid regularly (as by year, quarter, month or week) for services: stipend; esp. such compensation paid to holders of official, executive, or clerical positions” While some courts have applied this dictionary definition in cases where the term “salary” was in dispute, other courts have declined to be bound by a dictionary definition. Compare *Crandon v. United States*, 494 U.S. 152, 171 (1989) (Scalia, J. concurring); *Oregon Education Association v. Eugene School District No. 4J*, 633 P.2d 28, 31 (1981) with *Harlan v. Sweet*, 564 N.E.2d 1192, 1193 (1990); *Bell v. Roberts*, 28 A.2d 715, 717-718 (1942). These latter courts have given a more expansive interpretation to the term “salary” in order to effectuate the purpose and legislative intent of the particular statute in question. See *Harlan*, 564 N.E.2d at 1194 (in statute prohibiting certain public employees from receiving compensation in addition to paid salaries, court held that word salary “encompasses all forms of compensation paid to the public official for performing duties of office” whether called a salary or not); *Bell*, 28 A.2d at 718 (attorney fee payable by client not subject to garnishment by attorney’s creditor as the fee is considered salary which is protected from garnishment by statute); *Reynolds v. Reynolds*, 58 P.2d 660, 661-62 (1936) (in divorce action, fee for services received from referee in condemnation suit considered to be salary in statute which prohibits assignment of earnings without consent of spouse).

In order to determine whether the Legislature intended that the term “salary” in G.L. c. 268B be accorded such an expansive reading, we have examined the evolution of the definition of “public employee” within the legislative history of G.L. c. 268B. In 1978, a citizens’ initiative petition, House No. 5151, was filed. The subject of this petition was the creation of a State Ethics Commission and a requirement that certain elected and appointed public employees be required to file financial disclosure statements on a yearly basis. The initiative petition defined “Public employee” as

any individual who receives compensation at an annual rate of \$20,000 or more from the state or county or who exercises official responsibility with regard to : (1) contracting or procuring; (2) administering or monitoring grants or subsidies; (3) planning or personnel; (4) inspecting, licensing, regulating, or auditing any person; (5) any other activity where the official action has an economic impact of greater than a de minimus nature on the interests of any person (emphasis added).

At the same time as House No. 5151 was assigned to a legislative committee, other pieces of legislation concerning the creation of an Ethics Commission and financial disclosure were introduced by legislators. See House No. 1452 (creating an Ethics Commission); House No. 4119; House No. 2088; Senate No. 1089. Each of the bills which defined “public employee” used a different definition. The emphasis in House No. 2088 was upon elected officials and appointed officials at the state, county, and municipal level who had administrative or discretionary authority for the receipt or expenditure of public funds. Senate Doc. No. 1089, in pertinent part, required the following individuals to file financial disclosure statements:

(a) any elected official of the judicial or executive branch of state government (b) any person appointed

under state law to an office where, in the conduct of such office, such person: (1) has administrative and discretionary authority for the receipt or expenditure of public funds; or (2) is charged with the administration of any of the laws of this state; or (3) is engaged in a supervisory, policy-making or policy-enforcing work. (c) any employee of the judicial or executive branch of state government and any employee of the county or municipal levels of government who is paid a salary in excess of \$20,000 per year or where, in the conduct of such position, such person: (1) has administrative and discretionary authority for the receipt or expenditure of public funds; or (2) is charged with the administration of any of the laws of this state; or (3) is engaged in a supervisory, policy-making or policy-enforcing work ... (emphasis added).

All of these bills were assigned to the same committee. Subsequently, the Senate amended House No. 1452 by substituting Senate No. 1540. In Senate No. 1540 the definition of “public employee” changed again, and deleted any reference to a salary. In Senate No. 1540, a public employee subject to financial disclosure was “any person who exercises official responsibility on behalf of a governmental body, provided that any person who receives only reimbursement for expenses or who serves only on an advisory board where such board has no authority to expend public funds other than reimbursements for expenses shall not be considered a public employee for purposes of this chapter.”

Senate No. 1540 was passed and sent to the House, which substituted another bill, House No. 5715. This House substitution provided a definition of public official and public employee. “Public employee”, in relevant part, was defined as “any individual who received compensation from the state or county at an annual rate that is in excess of that of a state employee classified in step 1 of Job Group XXV of the general salary schedule in section forty-six of chapter 30 of the General laws”

“Public official” was defined as “any elected state or county official, any member of any governmental body appointed by the governor or the executive head of any governmental body...” The House and the Senate were unable to agree upon House No. 5715, so a joint conference committee was formed, which produced Senate No. 1626. Senate No. 1626 contains the current definitions of “public employee” and “major policy making position” and was enacted into law as G.L. c. 268B.

A common theme throughout these various bills is an intention by the Legislature that public officials who have responsibility, not only to make policy, but also to implement policy, or who are involved in managerial decision making which affects the interests of the public, or who are responsible for receiving or expending public funds, should disclose certain financial interests to dispel any appearance of a conflict of interest and to instill public confidence in government. See e.g., *Opinion of the Justices*, 375 Mass. 795, 807 (1978). In the legislative history of G.L. c. 268B, the use of a salary requirement in determining who would be required to make a financial disclosure appears to have been a subject of debate and continual change within the two Houses of the Legislature. By the use of the word “salary”, as measured by a certain salary range in the General Laws, the Legislature intended that certain state or county employees who fell within a certain salary level were presumed to have the requisite managerial responsibility necessary in order to require making financial disclosure.

After studying the evolution of the definition of “public employee”, we conclude that the change from the word “compensation” to “salary” in the final bill indicates that the legislature specifically chose the more restrictive term over the broader term of compensation, intending the word “salary” to mean a specific form of compensation. See e.g., *Elwood v. State Tax Commission*, 369 Mass. 193, 195 (1975). Our conclusion is buttressed by the fact that, although the Legislature used the terms compensation and salary elsewhere in G.L. c. 268B, §1, it did not use these terms synonymously. For example, in G.L. c. 268B, §1(j), the Legislature listed salary and recompense as separate enumerated terms within the definition of income.⁵⁷ Similarly, in G.L. c. 268B, §1(l) the Legislature contemplated that compensation would include more than salary. We are compelled to define terms consistently, within the same section of a statute. See, e.g., *Attorney General v. School Committee of Essex*, 387 Mass. 326, 337 (1982) (“in construing statute, words or phrases used in one part of statute should be related and considered in light of their context”).

In light of our conclusions regarding the legislative intent underlying the definition of public employee in G.L. c. 268B, we conclude that neither deputy earned a salary (as construed in common usage) within the meaning of G.L. c. 268B, §1(l). Their compensation, as you describe it, is not fixed and is not given for personal services. Rather, their income is based upon corporate profits. See *Bell v. Roberts*, 28 A.2d 715, 717-718 (1942) (distinguishing

fees and other salary due for personal services from profits based on the labor of others).

Therefore, we conclude that, although both deputies report directly to the sheriff, who is the administrative head of the sheriff's department, they do not meet the requisite salary requirement which would mandate financial disclosure as "persons whose salary equals or exceeds that of a state employee ... and who reports directly to said executive or administrative head."

This revised conclusion however, does not alter our additional conclusion in *EC-FD-93-1*, to wit, that both deputies are persons who hold major policy making positions and are required to file SFIs because they are "persons exercising similar authority". In considering the meaning of "persons exercising similar authority", we are guided by the statutory maxim that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A C. Sands, *Sutherland Statutory Construction*, §47.17; *Haas v. Breton*, 377 Mass. 591, 595 (1979); *Chwaliszewski v. Board of Appeals of Lynnfield*, 29 Mass. App. Ct. 247, 250 (1990). As we indicated above, although the definition of public employee was in a state of flux throughout the evolutionary process of G.L. c. 268B, a clear legislative intent, that certain high level managerial public employees who exercise powers concerning public policy and public funds or who administer the laws of the Commonwealth should file annual financial disclosures, remained constant throughout the process. We conclude that the Legislature intended to include persons who exercise similar^{6/} powers to the persons in positions which are listed in the preceding enumerations.

In the category of "persons exercising similar authority", the Legislature emphasized the authority or powers of the person, not their position within a formal institution. See also, *EC-FD-85-2*. Further, by separating the clause "persons exercising similar authority" from the preceding clauses by a semicolon, the Legislature meant that this clause stand as a separate independent category. See *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 434 (1983); *Moulton v. Brookline Rent Control Board*, 385 Mass. 228, 231 (1982). Thus, "persons exercising similar authority" are not required to be serving as judges, or as cabinet-level secretaries or as agency managers. What is necessary is that the person possess the power to exercise authority similar to the other enumerated public employees.

As we concluded in *EC-FD-93-1*, both deputies exercise similar authority to the head of a division, department or other major administrative unit within a governmental body, and, consequently, hold a major policy making position in a governmental body. For purposes of G.L. c. 268B, §1(h), the sheriff's department is a governmental body. The position of deputy sheriff is a governmental appointment which requires the appointee to take an oath of office. G.L. c. 37, §3. The sheriff is the appointing authority for the deputy sheriffs and has overall responsibility for service of process by the deputies in his county and for all official acts of the deputies whom he appoints. See G.L. c. 37, §§ 2 and 3. Thus, both of your clients are holding positions as deputy sheriffs within that sheriff's department.

Moreover, neither deputy merely serves process as functionaries. The sheriff has expressly delegated to them a major responsibility of his Office. See G.L. c. 37, §11. Both deputies are responsible for all service and execution of writs and process in their county. The statutory powers given to deputy sheriffs are substantial and affect the economic, personal, and liberty rights of all of the residents in the county. For example, deputy sheriffs are able to seize and sell property, make capias arrests, execute evictions, make attachments, and serve all legal judicial process. See generally, G.L. c. 262, §8; *Commonwealth v. Howe*, 405 Mass. 332, 334 (1989) ("deputy sheriff has authority to act that a private person would not have" in upholding authority of deputy sheriff to make a warrantless stop and arrest). Both deputies have the authority to make and implement the policies and procedures governing how these legal actions will be conducted in Essex County. Administratively, they collect, manage and account for hundreds of thousands of dollars in yearly fees and make the process serving assignments to the sixteen deputy sheriffs who serve under them. Clearly they are functioning at a managerial level similar to a department or division head. The County Commissioners, given the nature of the authority exercised by these deputy sheriffs, were justified in designating them to file SFIs.^{7/}

Additionally, in *EC-FD-93-1*, we analogized the deputies' situation to that of the chief deputy sheriff of the civil process division of another county sheriff, where the sheriff has organized the process serving function as a separate division within his office. That chief deputy has been designated as a public employee who must file a SFI. According to the job description filed with his appointing authority, the responsibilities of that chief deputy include: the responsibility for the service and execution of all lawfully issued precepts and other process in that

county; responsibility for instituting policies and procedures relative to the service of process in that county; responsibility for the implementation and maintenance of records regarding service of process in that county; responsibility for the day to day management of all deputy sheriffs and administrative staff assigned to the Division; and responsibility for the preparation of reports and financial data relative to service of civil process, including the annual financial accounting to the county treasurer, pursuant to G.L. c. 262, §8A. Both deputies are exercising similar authority to that chief deputy, who is the head of a division within a governmental body.

For the foregoing reasons, we continue to conclude that both deputies are properly designated “public employees” who are required to file SFIs. They fall within the category of “persons exercising similar authority”, and therefore occupy a major policy making position within the meaning of G.L. c. 268B, §1(l).

DATE AUTHORIZED: June 10, 1994

^{1/} You have provided us with additional facts concerning their compensation arrangement. The remaining facts in this opinion were taken from the facts previously given to the Commission by prior legal counsel, and two other sheriffs.

^{2/} Under G.L. c. 37, §3, “A sheriff may appoint deputies, who shall be sworn before performing any official act.” Service of process is included within the deputy sheriffs’ official acts. Under G.L. c. 37, §11 “Sheriffs and their deputies shall serve and execute, within their counties, all precepts lawfully issued to them and all other process required by law to be served by an officer.” See also, G.L. c. 220, §7.

^{3/} According to their 1991 and 1992 SFIs, in each year each deputy sheriff reported personal income earned from the Corporation in excess of \$100,000.

^{4/} In this opinion request you urge us not to rely upon 930 CMR 2.02 (17). We did not rely on 930 CMR 2.02 (17) in reaching our decision in *EC-FD-93-1*. We do not rely upon this regulation in the present opinion, but rather upon an analysis of the statutory language.

^{5/} We note that the Legislature did not attach a salary requirement to each of the enumerated phrases in G.L. c. 268B, §1(l). The Legislature specifically placed a salary requirement in only one enumerated phrase: “any person whose salary equals or exceeds that of a state employee classified in step one of job group XXV of the general salary schedule contained in section forty-six of chapter thirty and who reports directly to said executive or administrative head.” Each of the clauses is separated by a semicolon, which, in grammatical and statutory construction, “usually indicates that each clause is intended to be independent.” *Globe Newspaper Co. v. Boston Retirement Board*, 388 Mass. 427, 432 (1983); *Moulton v. Brookline Rent Control Board*, 385 Mass. 228, 231 (1982). We also note that the salary provision is the third such clause, indicating that it does not attach to the two preceding clauses and the two clauses which follow it. In addition, the proviso in G.L. c. 268B, §1(o), that the definition of public employee does not include individuals who receive no compensation except for reimbursement, recognizes the possibility that an individual may occupy a major policy making position, as defined by one of the other clauses, but not be compensated in such a position.

^{6/} By use of the word “similar” to modify authority, we believe that the legislature recognized that the authority need not be identical to the authority of other members in the preceding enumerations.

^{7/} The County Commissioners, not the Ethics Commission, originally designated one deputy to file a SFI. The Commission, in *EC-FD-93-1*, indicated that its conclusions applied equally to the other deputy as he shares responsibility on an equal basis.